No. 8433

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. D. Bell,

Appellant,

vs.

Apache Maid Cattle Company (a corporation), Babbitt Brothers Trading Company (a corporation), The Arizona Livestock Loan Company (a corporation), and H. V. Watson,

Appellees.

BRIEF FOR APPELLEES.

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Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellees deem it advisable briefly to recite the allegations of the amended bill of complaint of the appellant and to call attention to the reasonable inferences and conclusions to be drawn therefrom.

1. The amended bill of complaint, hereinafter in this brief referred to as the bill of complaint, sets forth that the appellees were the owners of 283 acres of patented land adjacent to, and improvements on, the Coconino National Forest, and possessed the rights

under permits from the United States Forest Service to graze 3174 head of cattle on said National Forest.

2. On or about January 31, 1931, the appellant entered into an agreement with the appellees whereby, subject to the consent and approval of the United States Forest Service and the officials thereof, the appellees would sell, convey and deliver to the appellant their said patented lands and said improvements on said Forest "together with sufficient range and area on said Forest to graze, run and maintain throughout the year not less than 960 head of cattle net by relinquishing from their said permit on said Forest sufficient range and area so to graze, run and maintain said number of cattle; and that the plaintiff (appellant herein) would purchase the same and pay to defendants (appellees herein) therefor the sum of $16.00 per head for said cattle, the sum of $4700.00 for improvements, and the sum of $2830.00 for said patented land, or a total of $22,890.00". (Plaintiff's Complaint, Paragraph V; Transcript of Record, page 8.)

It is to be noted that the contract as alleged

(a) Does not give the location of the range and area to be relinquished, other than a general description that it is in the Coconino National Forest, which National Forest is described in Paragraph III of the complaint as being situated in Coconino and Yavapai Counties, State of Arizona (T. 7) and that the portion of the range to be relinquished is a part of a much larger area.

(b) Does not state whether the obligation assumed by the appellees was to deliver a definitely agreed upon area or whether it was simply a general obligation on the part of the appellees to deliver sufficient range in the Coconino National Forest to graze, run and maintain 960 head of cattle. It would seem, however, that the latter construction of the agreement as alleged is the more reasonable under the language used to describe such agreement.

(c) If the agreement on the part of the appellees was only to furnish sufficient range to run 960 head of cattle, it does not appear whether the range thus to be relinquished was to be determined by appellant, by appellees, or by mutual agreement.

(d) The range relinquished was to be sufficient to run the specified number of head "throughout the year", which, obviously, must mean the year 1931, in January of which the contract was entered into, and not throughout subsequent years. No agreement could be made as to the number of cattle that could be run in succeeding years upon such range relinquished, as control thereof under the Forest regulations lies exclusively with the Forest Service, and under its regulations may, from time to time, be reduced. (See excerpts from the National Forest Manual Regulations and Instructions, United States Department of Agriculture, Forest Service, attached as an Appendix to appellant's brief under the caption "Reductions" pages 22-24.)

(e) While the appellant in his brief assumed that the alleged contract included a sale of 960 head of

cattle at $16.00 per head, although the allegations of the bill of complaint as a whole do not support such assumption, he, by his motion to strike all references to any sale of cattle on the ground that statements with reference thereto in his brief are errors, concedes that no cattle were sold and that the consideration for the relinquishment of the range rights by the appellees was computed upon the basis of $16.00 per head of cattle that appellant would be permitted to graze thereon.

3. It is further alleged in the complaint that at the time of entering into said contract and prior thereto, the appellee, the Apache Maid Cattle Company, had been notified by the Forest Service that, because of over-grazed conditions of the Forest, it would be required to reduce its number of cattle and grazing preference, and appellees knew that, in order to relinquish sufficient range and area to permit appellant to run 960 head of cattle, they would, in fact, have to relinquish a much greater range than at the time of making the contract would have been sufficient for that purpose. (Complaint, Paragraph VI; Transcript of Record, page 9.)

4. That this alleged notification by the Forest Service was concealed from the appellant by the appellees and was unknown to appellant.

5. That appellant thereupon paid to appellees the consideration of $22,890.00 payable under said alleged contract and expended a vast sum of money in the erection of fences and other improvements, and the appellees, besides conveying the patented lands and

improvements "pretended to relinquish sufficient range on said Forest to graze, run and maintain 960 head of cattle". That the appellees informed the appellant that they had executed the necessary instruments whereby the Forest Service allotted to him sufficient range for his purpose of grazing 960 head of cattle, but, as a matter of fact, "the said pretended relinquishment of 960 head of cattle was reduced by 320 head" and said Forest Service actually allotted to appellant range and area sufficient to graze, run and maintain not more than 640 head of cattle.

It may be inferred that the consideration was paid and the relinquishment effected some time during the year 1931 if the obligation of the appellees was only to furnish range sufficient to run 960 head of cattle throughout the year.

6. That the appellant did not discover the alleged fraud of appellees until October, 1933, or almost three years after the contract as pleaded was entered into.

APPLICABLE AND MATERIAL REGULATIONS AND INSTRUCTIONS OF THE FOREST SERVICE.

The appellant in his bill of complaint has failed to distinguish between preferences and permits. For the convenience of the court, attention is called to certain regulations and instructions of the Forest Service which are pertinent to the determination of the sufficiency of the bill of complaint, and of the right of the appellant to the relief sought, or any relief whatsoever. References are to pages in appellant's brief

under the appendix entitled: "Excerpts from the National Forest Manual Regulations and Instructions, United States Department of Agriculture, Forest Service", pages 16 to 36, inclusive.

(a) The difference between preferences and permits is set forth on page 22, which provides:

> "A grazing preference entitles the holder thereof to special consideration over other applicants, but no consideration as against the Government. The holder of the preference is a preferred applicant. Grazing preferences run on year after year indefinitely until canceled or revoked. A grazing permit is a document authorizing the grazing of livestock under specific conditions. It expires at a certain stated date. The terms 'preference' and 'permit' are not synonymous, and care should be exercised in their use. * * *"

(b) Applications for permits must be duly made by applicants. The supervisor will notify the applicant of the approval of his application by letter of transmittal, Form 861-G, showing the number of stock for which the application has been approved, the period, and the fees to be paid. (Pages 19-21.) Grazing fees are set forth in Regulation G-10, pages 28-29.

(c) Reductions in preferences and permits are to be made in the manner and to the extent set forth on pages 22-24 under the caption "Reductions".

(d) Regulation G-9, pages 24-25, deals with permits to purchasers, and is quoted in full:

> "Reg. G-9. To facilitate legitimate business transactions, under conditions specified by the

Forester, and unless otherwise authorized or limited by the Secretary of Agriculture, and upon satisfactory evidence being submitted that the sale is bona fide, a purchaser of either the permitted stock or the dependent, commensurate ranch property of an established permittee will be allowed a renewal of permit in whole or in part, subject to the maximum limit restrictions, provided the purchaser of stock only, actually owns dependent, commensurate ranch property, and the person from whom the purchase is made waives to the Government his preference for renewal of permit. A renewal of permit on account of purchase from a grantee who has used the range less than three years will not be allowed. A grazing preference is not a property right. Permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration."

The sale of the permit, therefore, to the appellant under the alleged contract as set forth in his bill of complaint, being made for a valuable consideration, subjected such permit to forfeiture. The contract as pleaded is accordingly illegal and void.

(e) The procedure required of the appellees under the contract as alleged in accordance with said regulations and instructions would be for them to waive to the Government their preference for renewal of the permit in question in whole or in part. The appellant in his application for the new permit would also have to present to the Forest Supervisor satisfactory evidence that the sale was bona fide. (See caption en-

titled Proof of Validity of Transfer, page 25.) If, however, the facts as alleged in the bill of complaint had been presented by the appellant that the range was being relinquished for a valuable consideration, the permit would necessarily have been forfeited.

(f) In case of purchase of ranch property only without stock as in the instant case, the procedure to be followed by the purchaser is set forth under the caption "Purchase of Ranch Property Only", page 28, which reads as follows:

> "One who purchases from the permittee commensurate dependent ranch property without the permitted livestock will be allowed a renewal of permit for the preference waived, subject to the maximum limit and the filing of a waiver from the original permittee. If surplus range is needed for distribution or protection a reduction not exceeding 20 per cent may be made."

Since the appellant purchased only ranch property and not the stock, the foregoing provision is applicable.

CONCLUSIONS TO BE DRAWN FROM ALLEGATIONS OF BILL OF COMPLAINT IN VIEW OF PROCEDURE REQUIRED BY FOREST SERVICE IN TRANSFERRING RANGE.

1. The alleged contract of appellant and appellees was illegal and void, and upon discovery of the fact that the permit or a portion thereof had been sold or transferred for a valuable consideration, the officers of the Forest Service would be required to forfeit the permit.

2. The appellant, upon waiver of the preference by the appellees, and upon his own application, would

receive his permit showing the number of cattle he would be allowed to run under such permit.

3. There is no allegation that the appellees failed to waive their preference for 960 head of cattle.

4. The appellant is presumed to know the regulations of the Forest Service, and that any permit obtained by him as the result of the waiver of the preference of the appellees would be subject to revision by the Forest Service of the amount of cattle that could be run upon range allotted to him under the renewal of permit to him.

5. Upon receipt of the permit to him, after the filing of such waiver, he had actual knowledge of the cattle he could run upon such range.

6. If he did not discover said fact until October, 1933, or about three years after the contract was made, it would logically follow that it was not carried out until that belated date, or that he failed and neglected during that period to apply for a permit.

7. Since the contract was made in January, 1931, and the alleged agreement of appellees was only to relinquish sufficient range to run 960 head of cattle "throughout the year", it would seem that a waiver three years later of that same amount of preference would constitute no breach if a permit issued in 1931 would have enabled the appellant to have run 960 head of cattle during that year.

8. The bill of complaint is defective in not alleging how and in what manner the appellant discovered in October, 1933, the fact he could run only 640 head of cattle.

SUMMARY OF ARGUMENT.

The motion to dismiss filed by the appellees was granted by the court on July 22, 1936. The appellant, by notice filed October 14, 1936, elected to stand upon his pleadings, and thereupon the order of dismissal was entered.

Position of appellant.

The appellant in his assignment of errors argues that the court erred in granting the motion and entering the order for dismissal, for the following reasons:

(a) Appellant's Proposition I. That said complaint alleges facts sufficient to constitute a cause of action against said appellees and each of them within the equity jurisdiction of the United States District Court for the District of Arizona and entitling the appellant to relief by a decree for the specific performance of the contract alleged.

(b) Appellant's Proposition II. That if said complaint is insufficient to give equity jurisdiction, a cause of action at law is stated requiring the cause to be transferred to the law side of the court.

Position of appellees.

In answer thereto, the appellees state their position as follows:

(a) Appellant's Proposition I. Said complaint did not allege facts sufficient to constitute a cause of action against said appellees, or any of them, within the equity jurisdiction of the District Court, or to entitle the appellant to relief by decree for specific performance of the contract alleged, for the following reasons:

First. The court, under its decree, could only order the waiver of the preference of appellees so as to provide additional range for 340 head of cattle subject to application for a permit by appellant to run such number of cattle, and the approval of the permit by the Forest Service including the approval of the amount of range and cattle to be run thereon.

Second. The alleged contract is too indefinite and uncertain to be enforced.

Third. The alleged contract is not one that the court could properly assume to decree its specific performance.

Fourth. The alleged contract is illegal and void under the regulations of the Forest Service.

Fifth. Upon the facts alleged, appellant has either waived his right to additional range or his claim is stale.

(b) Appellant's Proposition II. The cause should not have been transferred to the law side of the court, for the following reasons:

First. A cause of action at law is not stated.

Second. The contract as alleged is illegal and void.

Third. Under the facts and records in this case, if a cause of action at law were properly stated, equity rule 22 would not apply.

PROPOSITION I.

THE BILL OF COMPLAINT DOES NOT STATE A CAUSE OF ACTION WITHIN THE EQUITY JURISDICTION OF THE DISTRICT COURT FOR RELIEF BY WAY OF SPECIFIC PERFORMANCE OF THE CONTRACT ALLEGED.

First. The court, under its decree, could only order the waiver of the preference of appellees so as to provide additional range for 340 head of cattle subject to application for a permit by appellant to run such number of cattle, and the approval of the permit by the Forest Service including the approval of the amount of range and cattle to be run thereon.

As previously pointed out by reference to the regulations of the Forest Service, in order that a purchaser of ranch properties, as in the instant case, may be granted a renewal of permit of Forest range, two things are necessary, namely, that the purchaser must actually own dependent, commensurate ranch property, and the person from whom such purchase is made must waive to the government his preference for renewal of permit. Such grazing preference is not a property right. (Regulation G-9, pages 24-25.) The purchaser must thereupon make an application for a permit, stating the number of cattle he desires to run, and, if it be approved by the government, a letter of transmittal is sent him, Form 861-G, showing the number of stock for which the application has been approved, the period, and the fees to be paid. (Pages 19-21.) Such permit is subject to reduction in the amount of cattle to be run, as is set forth on pages 22-24 under the caption "Reductions". To require the appellant to waive a preference for an additional 340 head of cattle would first necessitate a determination as to whether sufficient range was to be released

to permit the appellees to run 960 head of cattle in the year 1931, or to permit them to run such cattle at the time the decree of court may be entered. It is alleged that the Forest Service consents to the relinquishment of range so as to permit the running of 340 additional head of cattle, but there is no allegation, nor would the regulation support an allegation that the Forest Service would consent to any arbitrary selection of range by the court thus to be relinquished by the waiver of preference, or that at the time the attempt to enforce the decree was made such range would be sufficient to graze, run and maintain that number of head of cattle. There is no allegation that the appellant would make application for any such permit or would pay his grazing fees. The order of the court simply could be that the appellees waive their preference to the government, which would be a futile act in event the proper steps were not taken by the appellant, subject to the approval of the Forest Service, to secure a permit for himself. It might well be that the court and the Forest Service would disagree as to the extent and character of range that would be necessary or proper to run 960 head of cattle, or if they did agree at any time, a subsequent change of conditions before enforcement of the decree would make it ineffective. It comes within the generally well recognized principle of law that a court will not decree specific performance of a contract where the consent or approval of a third party would have to be obtained.

Thus, it was held in the case of *Langford v. Taylor,* 99 Va. 577, 39 S. E. 223, that the government's consent

to removal of whiskey being necessary, the court will not decree the transfer of whiskey stored in a United States warehouse in the absence of a showing that plaintiff is ready to pay the tax necessary to obtain the government's consent. It is further stated in this case that "a court of equity will not interfere in specific performance where the court would be unable to enforce its own judgment".

> *Fry,* Specific Performance, Sec. 27;
> *Ellis v. Treat,* 236 Fed. 120;
> *Wichita Water Company v. City of Wichita,* 280 Fed. 770.

Second. The alleged contract is too indefinite and uncertain to be enforced.

Under the allegations of the complaint, the appellees were to deliver sufficient range and area to run 960 head of cattle for the year. As before stated, it would seem that the pleader does not intend to allege that this range and area was agreed upon. If it were, of course, the appellant should specifically set forth its description. It is obvious that the agreement as alleged was simply to deliver sufficient range and area without specification as to its location or extent, except the general allegation that it is located in the Coconino National Forest, situated in Coconino and Yavapai Counties, Arizona. The complaint does not state by whom the range and area were to be selected. It seems apparent that a court of equity cannot pick out some indefinite part of a range owned by the appellees and order the appellees to sign a waiver of their preference for the same to the government so as

to allow a new permit to be issued to appellant if he then decides to apply for it.

A contract to be specifically performed must be definite and certain and free from doubt, vagueness and ambiguity in all its essential elements. The contract as pleaded is not definite and certain and is most vague and ambiguous in its essential elements. It is fatally defective as to the identity of the subject matter. It contains no description of the property or range rights of the appellees which appellant seeks to have relinquished or conveyed. No means whatever are set forth to identify the range. It is uncertain as to whether a range thus to be transferred is range sufficient to graze 960 head of cattle throughout the year 1931 or 960 head of cattle at some indefinite future time. It is also uncertain, if the decree is entered, that such range will be sufficient for that purpose immediately thereafter. The Forest Service may reduce or increase the allotment. It is obvious that a court of equity will not determine what amount of range is sufficient to graze 960 head of cattle and decree specific performance, nor will it go out and select such range. It is well established as a principle of law that a court of equity will not decree the specific performance of a contract by the sale, exchange or conveyance of land or an interest therein, unless the contract designates or describes the land with definiteness and certainty, or furnishes or refers to means or data by which it can be identified and located by the aid of extrinsic evidence.

> 58 *C. J.*, Specific Performance, Section 100, page 935; and cases cited.

Thus, these contracts have been held too indefinite and uncertain for specific performance:

For the conveyance of a place of which a named person is in possession without further identifying it.

Edwards v. Rives, 35 Fla. 89, 17 So. 416.

Or land described under a contract as follows:

"My land, the entire tract, 728 acres."

Barnett v. Nichols, 56 Miss. 622.

Or a contract for the sale of a part only of a tract of land which fails to designate the specific portion to be conveyed.

McMillan v. Wright, 56 Wash. 114, 105 Pac. 176.

Or a contract for the sale of ten lots with a provision stamped across it to the effect that the vendor may substitute other lots containing the same number of square feet.

Salles v. Stafford (La.), 132 So. 140.

Or a contract for the sale of forty-eight acres one mile east of a certain town.

Gilman v. Brunton, 94 Wash. 1, 161 Pac. 835.

Or a contract for the sale of three thousand acres in a named county and state.

Rosen v. Phelps (Tex.), 160 S. W. 104.

Thus, in Section 110, 58 C. J. page 942, in the article on specific performance, it is stated: "A designation of the land as a certain quantity out of a larger described tract as of so many acres out of a specified

tract, is insufficient, where the boundaries of the part are not stated, or the part has not been carved out."

Rempke et al. v. Buehler, 203 Ill. 384, 67 N. E. 796;

Knight et al. v. Alexander et al., 42 Oregon 521, 71 Pac. 657; and numerous cases cited therein.

Third. The alleged contract is not one that the court could properly assume to decree its specific performance.

The determination of what range will be sufficient to graze, run and maintain any number of cattle depends upon the grazing condition of such range, which will differ in different localities in the same Forest and in different years. It cannot be mathematically determined, depending upon varying climatic, forage and grazing conditions, and upon the protection of the range in the Forest as a whole. It requires expert and scientific knowledge. A District Court judge should not reasonably be required to ride the range to ascertain conditions and the amount of area required for the purpose, because he cannot be assumed to have the required expert knowledge, and because in the last analysis whatever he might decree would be subject to the final determination of the Forest Service under its regulations and its policy of range protection.

58 *C. J.,* Section 45, page 889.

Fourth. The alleged contract is illegal and void under the regulations of the Forest Service.

It is specifically provided under Regulation G-9, pages 24-25, that sales of Forest permits are forbidden. The regulation provides specifically "that permits are granted only for the exclusive use and benefit of the persons to whom they are issued and will be forfeited if sold or transferred in any manner for a valuable consideration." This range is alleged to have been sold for a valuable consideration. If appellant had informed the Forest Service of the facts as stated in this alleged contract, the permit would have been forfeited. It is, therefore, as pleaded, an illegal and void contract, and neither an action at law can be maintained for damages under said contract, nor can an action for specific performance be maintained in the equity courts.

An identical case in point is *McFall v. Arkoosh,* 215 Pac. 978 (Ida.). This case was for damages for breach of a contract involving the sale and purchase of certain sheep, and in connection therewith an attempt was made to sell, for a valuable consideration, certain grazing rights on the National Forest possessed by the vendor. A verdict was rendered in favor of the purchaser, and, upon appeal, judgment was reversed and the District Court was directed to dismiss the action. In its opinion the court said:

> "At the close of the case it had been conclusively shown that the agreement upon which respondent relied in bringing this action was one forbidden by the regulations governing national forests. 1918

Use Book, p. 113, Reg. G-18. Both parties were conclusively presumed to know that the federal statutes authorized the Secretary of Agriculture to make regulations governing the grazing of stock on national forests (U. S. Comp. Stats. Sec. 823, 5126), and the courts of this state take judicial notice of such regulations. C.S. Sec. 7933. Caha v. United States, 152 U.S. 211, 14 Sup. Ct. 513, 38 L.Ed. 415. Such regulations have the force and effect of law. United States v. Grimaud, 220 U.S. 520, 31 Sup. Ct. 480, 55 L.Ed. 569; United States v. Eliason, 16 Pet. 291, 10 L.Ed. 968.

The contract, being clearly in violation of the regulations governing national forests, no action could be maintained for its enforcement, and respondent, being in pari delicto with appellant, under the rule generally followed by the courts, could not maintain an action for money paid pursuant to such an agreement. The law leaves such parties where it finds them. Libby v. Pelham, 30 Idaho, 614, 166 Pac. 575; Lingle v. Snyder, 160 Fed. 627, 87 C.C.A. 529; 13 C. J. p. 492, Sec. 440; 2 Page on Contracts, p. 1920, Sec 1089; 2 Elliott on Contracts, p. 344, Sec. 1067."

Regulation G-18 referred to was substantially the same as G-9 now in force, and provided as follows:

"Reg. G-18. Permits will be granted only for the exclusive use and benefit of the owners of the stock, and will be forfeited if sold or transferred in any manner or for any consideration. * * *"

Fifth. Upon the facts alleged, appellant has either waived his right to additional range or his claim is stale.

The contract as pleaded by the appellant, was entered into on or about January 31, 1931, and provided that the appellant was to relinquish sufficient range to run 960 head of cattle throughout the year. There is no allegation as to when the consideration was paid and the waiver of the preference to the government was executed and delivered.

If, on the one hand, this was done during the year 1931, the appellant, in order to have cause of complaint, would have had to file application for a permit covering the relinquished range, stating the number of cattle he desired to run on the range, and would have received a letter of transmittal from the government stating the number of cattle he could run upon it. By accepting such permit and paying the consideration, he would necessarily waive any breach, and if he had applied for or received the permit for 640 head of cattle before paying the consideration, and permitted approximately three years to pass without seeking relief from the appellees, it would appear that, upon the allegations of his bill, he is guilty of laches.

If, on the other hand, the contract was not consummated and the permit was not applied for during the year 1931 when it was made, then the effect of the relinquishment being to give the appellant only 640 head of cattle because of reductions made in the meantime by the Forest Service, could not and would not constitute a breach of the agreement.

The law is clear that the effect of laches is not avoided by a general averment appellant was ignorant of the facts until a certain time. There must be distinct averments as to when knowledge of the fraud or deception was obtained, why it was not obtained earlier, and as to the diligence of the appellant in investigating the transaction. The mere allegation of concealment and ignorance is not sufficient. The law must presume that the appellant has reasonable intelligence and would know all these years his rights to the range. An inquiry of the Forest Service at any time would have given him such information.

Hubbard v. Manhattan Trust Co., 87 Fed. 51;
Northern Pacific Railway Co. v. Kindred, 14 Fed. 77;
Credit Co. v. Arkansas Central Railway Co., 15 Fed. 46;
Kessler v. Ensley Co., 123 Fed. 546;
United States v. Christopher, 71 Fed. (2d) 764.

This rule is well stated in *Stearns v. Page,* 7 How. 819, 12 L. Ed. 928, as follows:

"A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment—must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved. If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments

> as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

PROPOSITION II.

THE CAUSE SHOULD NOT HAVE BEEN TRANSFERRED TO THE LAW SIDE OF THE COURT.

First. A cause of action at law is not stated.

The reasons set forth in the caption marked "Second" under Proposition I, why the bill of complaint does not state a cause of action in equity, apply equally to a cause of action upon the same alleged facts as an action in law for damages. No breach is shown because there is a failure to allege that the appellant at any time attempted to run or obtained the right to run 960 head of cattle on the Forest, or that he made a request for a permit giving him that right, or that any such request was denied by the Forest Service. Furthermore, the subject matter of the alleged contract is so indefinite and uncertain that the description of the property or range rights involved cannot be ascertained from the pleading, nor is reference made to means and data alleged by which it can be identified and located. The allegations with regard to such range and area are not sufficient upon which damages can be predicated.

The rule applicable thereto is stated as follows:

> "It is said to be an elementary rule that in order that a contract may be enforceable the prom-

ise or the agreement of the parties to it must be certain and explicit, so that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and, if thus defective, parol proof cannot be resorted to. The contract must be certain and unequivocal in its essential terms either within itself or by reference to some other agreement or matter. In addition to a definite promise, the SUBJECT MATTER of the agreement must be expressed in such terms that it can be ascertained with reasonable certainty. A contract which is so uncertain in respect of its SUBJECT MATTER that it neither identifies the thing by describing it, nor furnishes any data by which certainty of identification can be obtained, is unenforceable. * * *" (Capitals ours.)

6 *R. C. L.,* Par. 59, page 644.

The above rule is well illustrated in the early case of *Marriner v. Dennison,* 20 Pac. page 386, wherein it is stated:

"The real estate is described in the agreement as lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract. In what city, county, state, or country the land is situated does not appear. If the instrument were one attempting to convey title to property, its insufficiency would be apparent. But the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a

new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. (Citing cases.) But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus, if the description were 'my' farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were 'a' farm in Los Angeles county, it could not be rendered certain by the allegation of such etrinsic matter. (Citing cases.) It is not sufficient to allege that by the imperfect description given in the contract the parties intended to convey certain property. (Citing cases.) Thus it is said in Browne, St. Frauds, Sec. 371: 'The contract must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties.' Again, in section 385: 'It must, of course, appear from the memorandum what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified.' (Citing cases.) It is not enough, as we have said, to allege that by such incomplete description the parties intended to convey a certain tract of land. Such extrinsic facts must be alleged as will, in connection with such description, show that the particular piece of land was intended. If the facts

> alleged, together with the description set out, are not sufficient to identify the land, the contract must be held to be void for uncertainty."

This rule is again affirmed by the California District Court of appeal in the case of *Diffendorf v. Pilcher,* 2 Pac. (2d), page 430.

This principle is also followed in the cases cited below:

Wright v. L. W. Wilson Co. Inc., 290 Pac. 64 (Cal.);
McMahan v. Plumb, 96 Atl. 958 (Conn.);
Scanlon v. Oliver, 44 N. W. 1031 (Minn.).

Brockway et al. v. Frost, 41 N. W. 411 (Minn.) holds that an agreement for the conveyance of a designated number of acres "in" a specified larger tract is ineffectual because of uncertainty, and denies right of recovery of money alleged to have been paid as the purchase price.

Second. The contract as alleged is illegal and void.

This has been fully discussed in the caption marked "Fourth" under Proposition I, and we do not deem it necessary again to burden the court with a reiteration of our argument in this connection. It is the position of the appellees that no relief can be had under the contract as alleged either in law or in equity, for the reason, among others, that such contract is made unenforcible under Regulation G-9 of the Forest Regulations.

McFall v. Arkoosh, 215 Pac. 978 (Ida.).

Third. Under the facts of this case, if a cause of action at law were properly stated, Equity Rule 22 would not apply.

The motion to dismiss was granted by the court on July 22, 1936. The appellant waited until October 14, 1936, before taking any action whatever and then elected to stand upon his pleadings. During the interim, he made no request that the action be transferred to the law side of the court. Only after he elected to stand upon his pleadings, the order of dismissal was entered. It is, therefore, manifest that it was his desire to pursue the action in equity for specific performance, and that he did not intend to waive his equitable rights and substitute therefor an action in law for damages only. If the District Court had, of its own volition, transferred the action from equity to law, which, under the circumstances of this case would have been against the will of the appellant, he would have been deprived of a substantive right, to-wit, the right to have the court determine whether he is entitled to specific performance. This comes under the rule stated in the case of *American Land Co. v. City of Keene*, 41 Fed. (2d) 484 (First Circuit):

> "Even if it were proper under Section 274a of the Judicial Code and the equity rules for the case to be transferred to the law side and tried under new pleadings, the plaintiff has made no such request, preferring to rely for its relief on the equity side of the court. This court will not compel a litigant to transfer its action from equity to law or vice versa against its will. Fay v. Hill CCA 249 Fed. 415; Mobile Shipbuilding & Structural Co. v. Federal Bridge & Structural Co. CCA 280 F. 292, 295; Proctor & Gamble Co. v. Powelson, CCA 288 F. 299, 307."

The appellees recognize that as to the rule above stated in *American Land Co. v. City of Keene,* supra, there is a difference of opinion in the various circuits of the Federal Courts and that the cases cited by the appellant in his brief seem to support an interpretation of rule 22 that compels the court to transfer a cause from the equity to the law side of the court in instances where the action as pleaded should properly have been brought at law and not in equity. We submit, however, that, under the circumstances of this case, where the appellant not only failed to request a transfer of the case to the law side, which he had ample opportunity to do, but specifically rested upon his pleadings, and, in so doing, in effect expressed to the court his wish to have his right of specific performance tested in the Appellate Court, the rule as enunciated in the case of *American Land Co. v. City of Keene,* supra, is particularly applicable and sound and should be applied.

The appellant in this case is seeking specific performance of the alleged contract. It is true that he had an alternate prayer for damages. The effect of such a situation is passed upon specifically by a recent case in the Fifth Circuit entitled *Rushing et al. v. Mayfield Co. et al.,* 62 F. (2d) 318. In that case there was similarly a suit for specific performance and an alternate prayer for damages. The bill was dismissed by the court upon motion, and the question of whether the case should have been transferred to the law side was considered at length by the court at page 320 of its opinion. It was there said:

"The suit is one for specific performance brought in a federal court of equity. The attempt to join as an alternative relief a prayer to recover damages as at law for breach of contract cannot be recognized as proper equity practice. Nor does it render the whole suit one that ought originally to have been brought at law which is to be transferred to the law docket under Equity Rule 22 (28 U.S.C.A.-S 723) or 28 U.S.C.A.-S 397. The court of equity was called on to test the validity of the equity suit by a motion to dismiss on the merits, and dismissed it for want of equity. We approve this action expressing no opinion as to what, if any, relief, the appellant may have at law."

We, therefore, respectfully submit that the court properly granted the motion to dismiss and properly entered its order of dismissal of the action.

Dated, Flagstaff, Arizona,
April 14, 1937.

Respectfully submitted,

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